BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

Franklinton Preparatory Academy Educators Association,	:	Case 09-RC-144924
Petitioner,	:	
and	:	
Franklinton Preparatory Academy,	:	
Employer.	:	

BRIEF IN SUPPORT OF RESPONDENT-EMPLOYER'S EXCEPTIONS TO THE HEARING OFFICER'S DECISION AND RECOMMENDED ORDER

I. STATEMENT OF THE CASE.

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, as amended, Respondent Franklinton Preparatory Academy ("the School" or "FPA"), by its counsel, hereby submits the following exceptions to the Hearing Officer's Report on the Challenged Ballots and Objections and Recommendations to the Board dated May 14, 2015 ("Report").

FPA is a small community school—the statutory term for a "charter school"—serving approximately 130 high school students. (Tr. 551–55). On January 23, 2015, members of the FPA staff filed a petition for representation by the Franklinton Preparatory Academy Education Association ("FPAEA" or "Union") with the NLRB. On February 5, the FPA and the Union reached a stipulated agreement (Agreement) setting forth the bargaining unit as follows:

> All full-time and regular part-time professional employees who regularly work at least ten (10) hours per week during the school year, including teachers, behavioral intervention specialists, counselors, tutors, academic workforce liaisons and hybrid learning coordinators, but excluding all non-professional

> employees, casual employees, substitute employees, confidential employees, managerial employees, and all office clerical employees, guards and supervisors as defined by the Act.

(Stip. Election Agree't, 2/5/15). FPA provided its list of thirteen eligible voters (*Excelsior* List) on February 12 (Jt-4).[1]

The Election was held on March 5, 2015, and all thirteen individuals on the *Excelsior* list submitted ballots. The result of the Election was 5 yes votes, 4 no votes, one blank ballot, and three ballots that the Union challenged. The votes were counted, and these challenges will determine the outcome of the Election.

The NLRB held a hearing on April 16, 17, and 20, 2015 to address the Union's challenges to the ballots of two voters and its three objections. On May 14, Hearing Officer issued a Decision and Recommended Order recommending that the challenge to one contested ballot be overruled, the challenge to one contested ballot be sustained, and, as is most pertinent here, that two Union objections to conduct by the School be sustained. (R 11-12). Specifically, these objections dealt with the content of a single February 28 email from Martin Griffith, Chief Operating Officer of the Franklinton Preparatory Academy, to Julie Pfeifer, a teacher at FPA (*Id.*).

The School hereby files this brief in support of its exceptions to the Hearing Officer's findings sustaining the Union's objections.

II. STATEMENT OF FACTS.

The school opened its doors for the first time for the 2013-2014 school year. (Tr. 551). The Employer's management team is comprised of two individuals: Martin Griffith, the Chief Operations Officer, and Michael Reidelbach, the Chief Executive Officer. Reidelbach is a

[1] References to hearing exhibits will be cited as "Jt-__" for joint exhibits, "ER-__" for employer exhibits, and "P-__" for Petitioner Union exhibits. References to the Report will be cited as "R [page]:[line number]."

retired CEO who travels and has not been physically present at FPA since mid-January. (Tr. 579). When he is out of the School, he has authorized Griffith to handle all management and supervisory matters. (Tr. 579-80). When Reidelbach is present, he and Griffith share managerial responsibility over all employees. (Tr. 579-86). Other than management, the school has thirteen (13) employees who work over ten hours per week. These employees were identified on the Excelsior List. (Jt. 4). Included amongst these employees are Anne Hyland, Beth DeWitt, and Herbert Hatch.

In January 2014, three employees of the school Geral Leka, Julie Pfieffer, and Ryan Marchese—stood together an announced their support for unionization. (Tr. 118-119). Following this announcement, union cards were collected and a petition for a representation election was filed with the NLRB. An election was scheduled for March 5, 2015.

In response to the unionizing efforts at the school, the Employer actively engaged in a lawful anti-union campaign. This campaign included the distribution of notices to employees in order to provide additional information regarding the Union. (Tr. 588). These notices were regularly delivered via hand delivery or email in order to allow employees the opportunity to digest the information privately. On February 28, 2015, two days after sending a regular notice to employees, Griffith contacted an employee, Julie Pfieffer, regarding the upcoming union election. (Tr. 589-593). In his subsequent email, Griffith provided additional information to Pfeifer in the form of rhetorical questioning. (*Id.*). The email indicated that Pfeifer was free to respond or ignore the information provided therein; however, at no time did the Employer seek to threaten or interrogate Pfeifer or coerce her into sharing any known union sentiments. (Tr. 592-594).

III. STATEMENT OF QUESTION INVOLVED.

(1) Whether the Hearing Officer erred in concluding that excerpted language from the February 28 Griffith email amounted to an unlawful threat and warranted overturning the March 5, 2015 Election (Obj. 1-4; R 11:6–33).

(2) Whether the Hearing Officer erred in concluding that excerpted language from the February 28 Griffith email amounted to an unlawful implicit promise of benefits and warranted overturning the Election (Obj. 5-6; R 11:39–12:8).

IV. LAW AND ARGUMENT.

A. Common Objection Standard Issues for Both Exceptions.

Generally, when pre-election conduct is alleged to have invalidated a representation election, the party seeking to overturn the election bears a heavy burden. *Elizabethtown Gas Co. v. NLRB*, 212 F.3d 257, 262 (4th Cir. 2000). As the objecting party, the Union must establish both that unlawful acts occurred *and* "that they interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election." *NLRB v. Bostik Division, USM Corp.*, 517 F.2d 971, 75 (6th Cir. 1975), quoting *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26, 30 (5th Cir. 1969).

The Report cites the following factors the Board analyzes to determine if an objection interferes with employees' freedom of choice: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party

to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. *See, e.g., Avis Rent-a-Car*, 280 NLRB 580, 581 (1986).

Despite listing these standards, the Report does not appear to address each of these factors in its analysis. Factor (2), regarding the severity of the alleged incidents, will be discussed specifically in Sections IV(B) and (C), *infra*.

In this case, only three of the enumerated Factors—(4), (8), and (9)—offer support for sustaining the objections at issue. Conversely, the February 28 email constitutes the sole incident albeit giving rise to two objections at issue here cited by the Hearing Officer, which favors the School's position regarding the limited impact of any alleged violation with regard to Factor (1). Further, Factor (3) also favors overruling the objections because employee Pfeifer constituted the sole recipient of this email.

With regard to Factor (5), the record fails to provide any evidence showing that the statements at issue in Sections IV(B) and (C), *infra*, persisted in the minds of the unit members to any significant degree. The Report cites to case law stating that subjective evidence is "irrelevant" in this analysis. (Report 11-25). This Factor clearly places importance on the subjective impact of the misconduct on the election itself. Note, also, that courts have also looked to whether the behavior had an actual impact on the individuals who voted and were subjected to the alleged conduct, even when such threats involve violence toward employees. *NLRB v. White Knight Mfg. Co.*, 474 F.2d 1064, 68, n.2 (5th Cir. 1973) ("[T]here is no apparent indication that even any of these six were so intimidated by this conduct that they were unable to vote their personal preferences in the election."). Clearly, the actual impact on the bargaining unit members who read this email is, in fact, relevant.

Though Pfeifer and Marchese stated that Ward received this email, Ward herself offered no testimony regarding the email. Further, neither Marchese nor Pfeifer noted that the specific statements regarding the "hard line" in negotiations or the relating to a new election in a year's time had any impact on them. (*See* Tr. 120–26; 160–62; 183–90; 205–09; 220–25). There is no evidence that this impacted the vote of these employees, and all three posed for a picture celebrating the Union's receiving of a majority of the uncontested ballots. (E-2; Tr. 208–09).

Finally, regarding Factor (6), the Report states that this email was disseminated to four out of thirteen employees. However, each of these employees was a member of the "organizing committee" and, like Ms. Pfeifer, were known Union supporters. (Tr. 209). Further, the email, which was clearly intended to be personal, was disseminated by the Union supporters themselves—not management. (*Id*.).

So, in sum, Factors (1), (3), and (5) support overruling these objections. Meanwhile, Factors (4), (8), and (9) support sustaining the objections, and Factor (6) offers some additional though mitigated support. Ultimately, however, the severity of the alleged incidents noted in Factor (2) will likely be determinative.

B. GRIFFITH'S 2/28 STATEMENT REGARDING THE BOARD'S POSITION IN POTENTIAL NEGOTIATIONS IS INSUFFICIENT TO OVERTURN THIS ELECTION.

The School takes exception to the Hearing Officer's finding that the email's reference to Griffin's suspicion that the Board would bargain hard on wages amounts to objectionable conduct. (R 11:6). The Union has failed to establish that this statement was severe enough interfere with the employees' exercise of free choice to such an extent that they materially affected the results of the Election. *NLRB v. Bostik Division, USM Corp.*, 517 F.2d 971, 75 (6th Cir. 1975). As such, this objection should be overruled.

The Hearing Officer found that Griffith's statement that he suspected the Board would take a very hard line during negotiations on pay and other working benefits to be a threat. (R 11: 6–21). As an initial point, however, the Board has regularly held similar employer references to "hard bargaining" as lawful. *See, e.g.*, *International Paper*, 273 NRLB 88 (1984) (finding employer reference to hard bargaining coupled with statement that "leads us to believe that this union will agree to lower wages and benefits" not worthy of overturning election); *Life Savers, Inc.*, 264 NLRB 162 (1982); *Plastronics Inc.*, 233 NLRB 155 (1977) (upholding employer statement that bargaining "starts from scratch" as lawful). Further, single isolated incidents of illicit conduct toward only one bargaining unit member tend not to support the overturning of an election, even when those threats deal with violence. *Cal-West Periodicals Inc.*, 330 NLRB 87 (2000).

As a basis for this finding, the Report first relies on Griffith's placement of the quote at issue under a section entitled "facts." (R. 11:10). However, that single reference is not determinative in this case. Indeed, the statement indicates Griffith "suspects" that the Board would bargain hard—it is not a factual assertion that hard bargaining will in fact occur. (P-2). Further, the "facts" section contains several other obvious statement of opinion (*e.g.*, "We have created a safer, saner educational model . . ."; "Our strength lies in our ability to work together, to be flexible and to be nimble and responsive to events on the ground."). *Id.* Given the obvious opinions throughout this section of the email, a reasonable person would not conclude that the statement regarding the Board's suspected position in future bargaining would constitute a fact.

The Report relies on the assumption that the sole motivating factor for Griffith's suspicion relating to the Board's future bargaining positions is the "board's aversion to the union." (Report 11:11). This does not accurately reflect the text of the email or the record.

Although the email does generally question whether the Board would "welcome Unionization at FPA," it makes no connection between that question and a purported aversion to Unionization. (P-2). Rather, the support for this statement comes from two emails sent from Griffith to Pfeifer earlier in the week, including one within twenty-four hours of this email, regarding the School's financial situation. (E-10, E-11; Tr. 583–91). Both of these emails tie the School's position in a potential bargaining situation to its current financial state. (E-11, "Here's the Truth: At the end of FY14, FPA had $2,000 in the bank. This year we're projecting to have $5,000 at the end of the year. . . . There's no predicting what conditions will win in the end [of negotiations]."). Griffith's testimony provides that he sought to provide "additional information" as a follow up to the previous flyers from this week. (Tr. 591–92). In short, the record provides ample evidence that the Board's position is rooted in its financial circumstances.

Finally, the Hearing Officer asserts that Griffith's references to other favorable conditions would lead employees to "reasonably infer" that the School would revoke that generosity if the Union won the Election. (R. 11-20). However, these references are tied to the School's repeated statements about its potential position during bargaining—statements are not inherently unlawful. *See, e.g.*, *International Paper*, 273 NRLB 88 (1984) (finding employer statement that information "leads us to believe that this union will agree to lower wages and benefits" to be lawful). The "inference" that Griffith will remove the favorable terms already is not supported by the plain text of the email or the record and is therefore unreasonable.

In addition, the Report fails to note several key mitigating factors showing that the email fails to constitute a violation of the Act. This election was a close election with a very small unit, which oftentimes results in a more critical analysis of alleged misconduct. *NLRB v. Mr. Porto*, 590 F.2d 637 (6th Cir. 1978). That said, the very small numbers at issue here undermine

need for an "objective" approach to the analysis, particularly when half of the voters in the election serve as witnesses (six out of twelve). Here, the only recipient of the email was a Union supporter, who then disseminated it only to other employees who also supported the Union and to her Union Representative. The record provides no evidence that any of these individuals changed their votes or were otherwise not free to vote their preference.

In addition, the fact that this email was disseminated by Union supported establishes that it was not perceived to be threatening. The email contains highly personal information directed to Pfeifer by Griffith and clearly was not intended to be shared. (P-2; Tr. 206). By sharing this email and the contents thereof with other bargaining unit members, the Union undermines its position that it was so threatening that it inhibited voters from voting freely. (Tr. 126, 185, 186–89). Further, as stated above, Further, neither Marchese nor Pfeifer noted that the specific statements regarding the "hard line" in negotiations or the relating to a new election in a year's time had any impact on them. (*See* Tr. 120–26; 160–62; 183–90; 205–09; 220–25). There is no evidence that this impacted the vote of these employees who learned of the contents of the email. (*See* E-2; Tr. 208–09).

Each of the points relied upon by the Hearing Officer are either controverted or significantly mitigated. As such, the School requests that this objection be overruled.

C. THE UNION'S OBJECTION REGARDING IMPLICIT BENEFITS DOES NOT AMOUNT TO A VIOLATION OF THE ACT.

In its second exception, the School takes exception to the Hearing Officer's finding implicitly promised benefits to the employees. (Report 11:39 – 12:8). Specifically, the Report's reliance on *Reno Hilton*, 319 NLRB 140 (1995) is misplaced, and the objection should be overruled.

In cases involving implicit promises, the relevant inquiry centers on whether employees would reasonably view the subject of the promise as a benefit. *See, e.g., Comcast Cablevision of Philadelphia*, 313 NLRB 220 (1990). The Board has found that "[g]eneralized expressions of this type, asking for 'another chance' or 'more time' have been held to be within the limits of permissible campaign propaganda." *National Micronetics*, 277 NLRB 993 (1985). Without specific promises of what will be improved or granted, such statements do not violate the Act. *Noah's New York Bagels*, 324 NLRB 42 (1997); *National Micronetics*, 277 NLRB 993. This requirement of specificity holds true even where an employer precedes such a statement with references to benefits previously bestowed upon its employees. *Newburg Eggs, Inc.*, 357 NLRB 171, n. 12,13 (2011).

The Hearing Officer found the following statement, in the context of the email, to be an illegal implicit promise: "If I haven't done *what I say we can do*, another union election can be held in 366 days." (Report 12:1, emphasis added). However, Petitioner has not connected this vague statement with any specific promises, whether previously stated or included in the email. The email references many current conditions—support the School "already" provides, prior salary increases that had already occurred, retention rates, and professional development. (P-2). However, the sentence preceding the above-quoted language provides that, despite obstacles, the School is "open, growing and impacting the lives of hundreds of kids" from the impoverished Franklinton area. The record does not connect Griffith's vague quote to any specific "things" that Griffith "say[s] I can do."

The hearing officer likens the facts in this case to *Reno Hilton*, 319 NLRB 140 (1995). There, the Board considered a laundry-list of past benefits as implicitly connected to the statement, "Give me a chance, and *I'll deliver*." (Emphasis added). However, *Reno Hilton* is

distinguishable from the facts at issue. First, in *Reno Hilton* the Board reached its finding upon considering the quote above "in the broader context of the Respondent's unlawful promises of benefits, grants of benefits, and implied promises to remedy grievances." *Id.* However, the Board has refused to extend this holding to cases where significant other related violations have occurred. *Newburg Eggs, Inc.*, 357 NLRB 171, n.13 (2011) (finding that the employer's plea for "one more chance" not a violation even though employer made multiple references to prior grants of benefits that had been the subject of an objection and stipulation). Here, there have been no other illegal explicit promises, implied promises, or grants of benefits. As such, under *Newburg Eggs*. Griffith's statement would not amount to an implicit promise of benefits.

In addition, the Board has found that, without a clear promise of what will be improved upon, a general request for another chance cannot be construed as a promise of benefits. *Noah's New York Bagels*, 324 NLRB 42. In *Noah's*, the employer noted prior mistakes in a speech to employees and stated, "Please vote to give us a second chance to show what we can do. If we don't meet your expectations, the Teamsters will be there—they'll be just as happy to take your dues and initiation fees later as they are now." The Board noted that, without a "specific promise that any particular matter would be improved upon," this statement would not amount to an unlawful implicit promise of benefits. *Id.*, citing *National Micronetics*, 277 NLRB 993.

The facts at issue in this case align much more closely with *Noah's* than with *Reno Hilton*. Griffith's conditional statement and reference to a future election is nearly identical substantively to that in *Noah's*, whereas *Reno Hilton* analyzes the clear assertion "I'll deliver." In such cases, an ambiguous promise without any specifics is insufficient to show an 8(a)(1) violation under the Act. This objection is therefore without merit and should be overruled.

D. CONCLUSION.

The School excepts to the Report's findings sustaining two of the Union's objections. The Union has failed to meet its burden of establishing that the School's conduct violated the Act and materially impeded the bargaining unit members from voting based on their individual preferences. The record is devoid of evidence that the language within the emails impacted the voters to the point that the Election should be overturned, and the lack of severity of the statements at-issue would not reasonably tend to interfere with the employees' exercise of free choice.

The School therefore requests that the valid NLRB Election from March 5 be upheld and the Union's objections be overruled.

Respectfully submitted,

Date: May 28, 2015

By: /s/ Adam J. Schira

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Certificate of Service

The undersigned hereby certifies that a true and accurate copy of the foregoing was served via e-mail this day of the 28th day of May, 2015, upon Kristin Watson, KWatson@cloppertlaw.com.

/s/ Adam J. Schira
Adam J. Schira (0087665)

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RESPONDENT-EMPLOYER'S EXCEPTIONS TO THE HEARING OFFICER'S DECISION AND RECOMMENDED ORDER

I. STATEMENT OF THE CASE.

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, as amended, Respondent Franklinton Preparatory Academy ("the School" or "FPA"), by its counsel, hereby submits the following exceptions to the Hearing Officer's Report on the Challenged Ballots and Objections and Recommendations to the Board dated May 14, 2015 ("Report"). The page number at the beginning of each exception refers to page numbers in the Report.

1. To the failure to find that Griffith's statements in February 28, 2015 email did not constitute threats worthy of overturning the March 5, 2015 Election. (R 11:6 – 33; P-2).

2. To the finding that Griffith's characterization of his suspicion that the Board would take a "very hard line" on pay, benefits, working conditions, and "other things that [he had worked so hard to bring to FPA" if the employees chose the Union as a fact was determinative in sustaining the objection. (R 11:10; P-2).

3. To the finding that the overview of favorable terms in the email leads to a reasonable inference that Employer would revoke such generosity. (R 11:21; P-2).

4. To the statement that the subjective response to the email or that they were all Union supporters is "irrelevant." (R 11:26).

5. To the finding that Griffith implicitly promised to grant employees benefits if they voted no in the election by questioning the "rush" and stating that another election could be held "If I haven't done what I say we can do." (R 11:38 – 12:2; P-2).

6. To the reliance on Reno Hilton, 319 NLRB 1154 (1995) in reaching the finding in exception 5.

Respectfully submitted,

Date: May 28, 2015

By: /s/ Adam J. Schira

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/s/ Adam J. Schira
Adam J. Schira (0087665)

Amended Certificate of Service

The undersigned hereby certifies that true and accurate copies of the Respondent-Employer's Exceptions to the Hearing Officer's Decision and Recommended Order and Brief in Support was served via e-mail this day of the 28th day of May, 2015, upon Kristin Watson, KWatson@cloppertlaw.com.

Additionally, the undersigned herby certifies that a true and accurate copy of the foregoing Respondent-Employer's Exceptions to the Hearing Officer's Decision and Recommended Order and Brief in Support were served via electronic filing this day of the 29th day of May, 2015, upon Garey Lindsay, Regional Director, National Labor Relations Board, Region 9.

/s/ Adam J. Schira
Adam J. Schira (0087665)